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No. _____

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

DANIEL J. McCARTHY, DANIEL VASQUEZ and ROBERT BORG, Petitioners,

v.

JOSEPH TOUSSAINT, et al., Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether a federal court has jurisdiction in a civil rights action under 42 U.S.C. § 1983 to order state prisoners released from segregated confinement to less restrictive, general population, custody.

2. Whether state prison officials who elect to provide prisoners with access to the courts by establishing prison law libraries must also provide legal assistance at state expense to dangerous segregation prisoners who are provided paging, but not unlimited browsing access, to an adequate prison law library.

LIST OF PARTIES

The parties to the proceedings below were petitioners, Daniel J. McCarthy, Daniel Vasquez and Robert Borg. Daniel J. McCarthy is the Director of the California Department of Corrections. Daniel Vasquez is the Warden of San Quentin State Prison, and Robert Borg is the Warden of Folsom State Prison. Respondents here and below are Joseph Toussaint, and the class of prisoners confined in segregation housing units at San Quentin and Folsom State Prisons.

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Petitioners, Daniel J. McCarthy, Director of the California Department of Corrections, Daniel Vasquez, Warden of San Quentin State Prison, and Robert Borg, Warden of Folsom State Prison, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on September 30, 1986.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 801 F.2d 1080 and is reprinted in the appendix

submitted with this petition (Appendix, pp. 1-136).

Also reproduced in the appendix submitted with this petition is the order filed by the Ninth Circuit on December 31, 1986, denying respondents' petition for rehearing and suggestion for rehearing en banc (Appendix, p. 300).

The findings of fact, conclusions of law, order of reference and judgment of permanent injunction of the United States District Court for the Northern District of California (Weigel, D. J.) are reported at 597 F.Supp. 1388 and are reproduced in the appendix submitted with this petition (Appendix, pp. 137-299).

JURISDICTION

The Ninth Circuit rendered its opinion and entered judgment on September 30, 1986. The Ninth Circuit denied respondents' petition for rehearing and suggestion for rehearing en banc on December 31, 1986. This petition is timely filed within ninety

days of that date.

The jurisdiction of this Court to review the judgment of the Ninth Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The statutes involved are 28 U.S.C. §§ 2241 and 2254 and 42 U.S.C. § 1983. These statutes are reproduced in the appendix submitted with the petition (Appendix, pp. 301-309).

STATEMENT OF THE CASE

This civil rights class action under 42 U.S.C. § 1983 began in 1973 on behalf of prisoners confined in administrative segregation in four California Prisons: San Quentin, Folsom, the Deuel Vocational Institution at Tracy, and the Correctional Training Facility at Soledad. Petitioners, the Director of the California Department of Corrections, and the Wardens of San Quentin and Folsom, are named defendants.

The original complaint in the proceeding below was filed in the United

States District Court for the Northern District of California in 1973. Jurisdiction in the district court was predicated on 28 U.S.C. §§ 1343(4) and 2201. By later amended complaints, the class of prisoner plaintiffs sought declaratory and injunctive relief against conditions and practices in administrative segregation units at the four California prisons. The prisoner plaintiffs also sought procedural safeguards for administrative segregation placement and retention decisions.

In October 1984, the district court issued a permanent injunction governing conditions of confinement and administrative segregation placement and retention procedures at San Quentin and Folsom.[1/] Toussaint v. McCarthy, 597

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1. This case has a lengthy procedural history involving the earlier issuance of preliminary injunctions, Wright v. Enomoto, 462 F.Supp. 397 (N.D.Cal. 1976) and Toussaint v. Rushen, 553 F.Supp. 1365 (N.D.Cal. 1983), and the resulting (Footnote 1 continued on following page)

F.Supp. 1388 (N.D.Cal. 1984). The permanent injunction, among other things, continued and expanded upon the detailed procedures for segregation decisionmaking required by Wright v. Enomoto, 462 F.Supp. 397, 404-405 (N.D.Cal. 1976), and required extensive improvements in conditions in segregation units.[2/]

In relevant part, the district court ordered prison officials to provide segregation prisoners with direct access to prison law libraries, but permitted prison officials to deny direct library access to segregation prisoners for compelling

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(Footnote 1 continued)
appeals to this Court, Enomoto v. Wright, 434 U.S. 1052 (1978) and to the Ninth Circuit, Wright v. Rushen, 642 F.2d 1129 (9th Cir. 1981), and Toussaint v. Yockey, 722 F.2d 1490 (9th Cir. 1984).

2. The permanent injunction governs conditions and practices at San Quentin and Folsom only, because a scheduling order limited trial on the merits to those two institutions. Segregation units at Deuel Vocational Institution and the Correctional Training Facility are still subject to a preliminary injunction. Toussaint v. Rushen, 553 F.Supp. 1365 (N.D.Cal. 1983).

security reasons. The permanent injunction required prison officials to provide segregation prisoners with a list of the law library's contents and to obtain promptly at least five law books per week requested by any segregation prisoner denied physical access to the library for security reasons. Toussaint v. McCarthy, 597 F.Supp. at 1424.

The district court also appointed a special master, known as the Monitor, to oversee and report on compliance with the permanent injunction. Toussaint v. McCarthy, 597 F.Supp. at 1420-22, 1425-27. The district court empowered the Monitor to order prisoners released from segregation during the period, known as the interim period, when conditions in the segregation units remained below constitutional minima. Id. at 1426-27.

The Ninth Circuit affirmed in part, reversed in part, vacated in part, and remanded in part the district court's

permanent injunction. Toussaint v. McCarthy, 801 F.2d 1080 (9th Cir. 1986). In relevant part, however, the Ninth Circuit ruled that the district court did not exceed its jurisdiction in this civil rights action by authorizing the release of prisoners from segregation. 801 F.2d at 1102-1103. Although the Ninth Circuit limited the possibilities for the district court's use of any segregation release powers during the interim period by vacating the provision of the permanent injunction authorizing the Monitor to release prisoners from segregation, the Court of Appeals remanded the due process issue to the district court to determine the need for any additional relief, including review of prison officials' segregation decisions, warranted by any finding of petitioners' unwillingness to adhere to the procedures required by the Ninth Circuit. 801 F.2d at 1106, n. 26, 1114.

The Ninth Circuit also held in pertinent part that prison officials must provide legal assistance to any segregation prisoner denied physical access to a prison law library for security reasons. Toussaint v. McCarthy, 801 F.2d 1108-10, 1114. The Ninth Circuit ruled that prisoners denied physical access to the law library are entitled to as yet undefined legal assistance. In so ruling, the Court of Appeals rejected the contention that a "paging" system, which permitted segregation prisoners to request and to have delivered to them law books, adequately protected the right of access to the courts of prisoners denied physical access to a library. 801 F.2d at 1109-10. Accordingly, the Ninth Circuit affirmed that provision of the district court's permanent injunction requiring prison officials to permit segregation prisoners physical access to a law library, but the Court of Appeals reversed the provision

permitting prison officials to rely on a paging system for satisfaction of the right of access to the courts of segregation prisoners denied physical access to the law library for security reasons. 801 F.2d at 1114.

REASONS FOR GRANTING THE WRIT

I

THE NINTH CIRCUIT'S DECISION THAT A DISTRICT COURT MAY ORDER STATE PRISONERS RELEASED FROM SEGREGATION TO LESS RESTRICTIVE CONFINEMENT IN AN ACTION UNDER 42 U.S.C. § 1983 CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER CIRCUITS AND RAISES AN IMPORTANT, UNRESOLVED ISSUE OF FEDERAL JURISDICTION.

For the "interim period" during which conditions in petitioners' segregation housing units remain below constitutional minima, the district court retained the power to order certain prisoners released from segregation to less restrictive, or general population, confinement. Although the Ninth Circuit curtailed the district court's possibilities for use of this release power, the Ninth Circuit held that the relevant federal habeas corpus statutes and this Court's decision in Preiser v. Rodriguez, 411 U.S. 475 (1973), did not preclude the issuance of orders releasing prisoners from administrative segregation

in actions under 42 U.S.C. § 1983. Accordingly, the Ninth Circuit concluded that a federal district court has jurisdiction in a Section 1983 civil rights action to order prisoners released from segregation. This ruling conflicts with Preiser and decisions by other circuits. For this reason, the Ninth Circuit's decision warrants this Court's plenary consideration.

In Preiser, this Court ruled that a prisoner's challenge to the fact or duration of his imprisonment must be brought under 28 U.S.C. §§ 2241 and 2254, the relevant habeas corpus statutes, not in a civil rights action under 42 U.S.C. § 1983. 411 U.S. at 489-91, 500. Simply put, Preiser held "...that when a state prisoner is challenging the very fact or duration of his physical imprisonment, and the relief he seeks is a determination that he is entitled to immediate release or a speedier release from that imprisonment,

his sole federal remedy is a writ of habeas corpus." 411 U.S. at 500.

When a state prisoner seeks release from segregation, claiming that his placement there violates due process or other constitutional rights, the prisoner seeks a determination that he is entitled to immediate release or a speedier release from that segregated confinement. A state prisoner challenging his placement or retention in segregation challenges the fact or duration of his imprisonment there instead of the prison's less restrictive general population. For this reason, as several circuits have recognized, a state prisoner seeking release from segregation must challenge his confinement there by a petition for writ of habeas corpus, not by an action for injunctive relief under the Civil Rights Act. McCall-Bey v. Franzen, 777 F.2d 1178, 1191 (7th Cir. 1985); Boudin v. Thomas, 732 F.2d 1107, 1111 (2nd Cir. 1984); Jackson v. Carlson, 707 F.2d 943,

946 (7th Cir. 1983); McCollum v. Miller, 695 F.2d 1044, 1046 (7th Cir. 1982); Streeter v. Hopper, 618 F.2d 1178, 1181 (5th Cir. 1980); Krist v. Ricketts, 504 F.2d 887-88 (5th Cir. 1974). The Ninth Circuit's decision conflicts with these decisions by the Seventh, Second and Fifth Circuits.

As in Preiser, the question here is of considerable importance. For if the Ninth Circuit's decision stands, a state prisoner seeking release from segregation in an action under the Civil Rights Act need not first exhaust state administrative and judicial remedies. Monroe v. Pape, 365 U.S. 167, 183 (1961). If, however, habeas corpus is the exclusive remedy, a prisoner seeking release from segregation may not ask for federal intervention without first requesting and being denied relief in the state courts.

The conflict created by the Ninth Circuit's decision means that state

prisoners seeking release from segregation within the Ninth Circuit will have direct access to federal court in actions for injunctive relief under 42 U.S.C. § 1983. State prisoners seeking the same relief in the Second, Fifth and Seventh Circuits, however, will be required to exhaust state remedies before gaining access to federal court by petitions for writs of habeas corpus. Thus, the Ninth Circuit's decision creates a right of direct access to federal court, a form of relief denied state prisoners in at least three other circuits. This anomaly requires resolution by this Court.

In holding that the habeas corpus statutes, as interpreted in Preiser, do not deprive a federal court of jurisdiction to release state prisoners from segregation in civil rights actions, the Ninth Circuit overlooked the purpose of the great writ. "The purpose of a federal writ of habeas corpus is not to redress civil injury, but

to release the applicant from unlawful physical confinement." Allen v. McCurry, 449 U.S. 90, 104 (1980). Unlawful physical confinement may include confinement in the wrong institution. Humphrey v. Cady, 405 U.S. 504 (1972); In re Bonner, 151 U.S. 242 (1894). Logically, unlawful physical confinement must also include wrongful confinement in the most restrictive unit of an institution. Because release from segregation to less restrictive confinement falls within the traditional core of habeas corpus, the Ninth Circuit erred in its conclusion that federal courts have jurisdiction to order the release of state prisoners from segregated confinement in actions under 42 U.S.C. § 1983.

The Ninth Circuit's erroneous ruling creates a need for conformity among the circuits regarding the limits on the jurisdiction of federal courts in civil rights actions brought by state prisoners seeking release from segregated

confinement. The question raised by the Ninth Circuit's decision is of considerable public importance, because of the State's significant interest in internal prison administration, particularly the assignment of prisoners to segregation. For these reasons, a grant of certiorari is compelled.

II

THE NINTH CIRCUIT'S DECISION REQUIRING THAT DANGEROUS SEGREGATION PRISONERS PROVIDED PAGING ACCESS TO A PRISON LAW LIBRARY FOR SECURITY REASONS BE PROVIDED LEGAL ASSISTANCE UNREASONABLY EXTENDS STATE PRISONERS' RIGHT OF ACCESS TO THE COURTS AND CONFLICTS IN PRINCIPLE WITH DECISIONS OF OTHER CIRCUITS.

This Court has stated several times that prisoners enjoy a fundamental right of access to the courts. Bounds v. Smith, 430 U.S. 817, 821 (1977); Wolff v. McDonnell, 418 U.S. 539, 578-79 (1974). In Bounds, this Court held that the right of access to the courts imposed upon states an affirmative obligation to assist prisoners

in the preparation and filing of meaningful legal papers by establishing adequate law libraries or providing adequate assistance from persons trained in the law. Bounds v. Smith, 430 U.S. at 828. This case concerns the means of access to an adequate prison law library by maximum security segregation prisoners deemed too dangeous for personal visits to a library.

This case involves conditions and practices in the maximum security segregation housing units at San Quentin and Folsom state prisons, the highest security housing units in two of the State's maximum security prisons. These units typically house the most dangerous and violent offenders, many of whom have assaulted other inmates or prison staff. Prison officials do not permit some of these inmates direct personal access to a prison law library for security reasons. Precisely for that reason, the Ninth Circuit has ruled that prison officials

must give these dangerous felons a benefit not provided to any other inmates, especially those who conform their behavior to prison rules: the right to legal assistance from persons trained in the law. The Ninth Circuit's ruling thus turns accepted penological practice on its head.

In Bounds, North Carolina prison officials contended that the Constitution required only that they not restrict inmate communications on legal problems. There, North Carolina objected to the requirement that it expend state funds to implement affirmatively prisoners' right of access to the courts. Id. at 823. Thus, although Bounds generally prescribed prison officials' obligations to assist prisoners in the preparation of legal papers, it did not address the question here. That is whether something other than direct physical access to a prison law lirary adequately protects prisoners' right of access to the courts.

California has adequate prison law libraries. Prison officials, however, restrict direct physical access to their law libraries for segregation prisoners deemed too dangerous for transportation to central prison libraries. Instead, prison officials allow those inmates who pose threats to institutional security to request and obtain for use in their cells law books from prison libraries. Prison officials also provide upon request a list of their libraries' contents, including reference and basic source materials, for use by those inmates denied physical library access.

A library paging system of this type provides access to legal materials functionally equivalent to direct access. Prisoners using a paging system are able to determine from a list of the library's contents which materials to request, as prisoners provided direct access may learn from searches of the library's card

catalogues. Segregation prisoners may also consult basic sources and reference materials in their cells to determine what case law materials, if any, to review in support of their claims. These prisoners may then obtain case materials as needed by an exact cite paging system and check subsequent histories with material available upon request from the library. Thus, segregation prisoners may have library access equivalent to that of general population prisoners.

Despite the affirmative steps taken by California prison officials to assist segregation prisoners in the preparation and filing of legal papers and the similarity between a paging system and physical access, the Ninth Circuit held that segregation prisoners denied physical access to prison law libraries must also be provided with legal assistance from persons trained in the law. The Ninth Circuit's decision requires California prison

officials to provide prisoners both, rather than one, of the alternative options presented by Bounds. The Ninth Circuit so ruled even though Bounds did not expressly require direct physical access to a law library for protection of prisoners' right of access to the courts. Ironically, the Ninth Circuit's decision also rewards the most incorrigible and violent prisoners in California.

Accepted penological practice dictates that prisoners be rewarded for positive, conforming behavior, not for conduct that threatens the lives of inmates and prison staff or institutional security. The Ninth Circuit's ruling, however, encourages prisoners to disrupt prison security or to assault others, especially if they are already in segregation, in order to get legal assistance for collateral attacks on their convictions or other legal actions. This dangerous precedent warrants this Court plenary consideration.

The Ninth Circuit's decison also unreasonably extends for segregation prisoners the protection granted for all prisoners' right of access to the courts in Bounds. Bounds equates adequate prison law libraries with adequate protection of prisoners' fundamental right of access to the courts. That case does not expressly impose any limits on prison officials' right to restrict physical access to prison law libraries for security reasons. Bounds itself also does not require direct physical access to prison law libraries for protection of prisoners' right of access. In fact, Bounds permits prison officials to be creative in their efforts to assure prisoners of meaningful access to the courts. 430 U.S. at 830.

A paging system that allows segregation prisoners to order for use in their cells legal materials from a list of the library's contents is one creative effort to assure the right of access to the

courts for segregation prisoners too dangerous to be allowed physical access to a library. The right of access to the courts should not demand that segregation prisoners, who have abundant time to contemplate and pursue legal actions and paging access to legal materials in a prison law library, be provided, in addition, with legal assistance from persons trained in the law.

Although the Fourth and Fifth Circuits apparently agree with the Ninth Circuit, Williams v. Leeke, 584 F.2d 1336, 1339 (4th Cir. 1978), cert. denied, 441 U.S. 911 (1979), and Green v. Ferrell, 801 F.2d 765, 772 (5th Cir. 1986), the Ninth Circuit's decision conflicts in principle with the decision of the Seventh Circuit in Arsberry v. Sielaff, 586 F.2d 37 (7th Cir. 1978). There, the Seventh Circuit held that segregation prisoners in Illinois prisons denied visits to prison law libraries were only entitled to some opportunity to

exercise their right of access to the courts and that their opportunity to request materials from a law library was constitutionally adequate protection of that right. Id. at 39, 43, 44.

More recently, in a case brought by a prisoner in the Control Unit of the United States Penitentiary at Marion, Illinois, the highest level maximum security prison in the federal system, the Seventh Circuit found that the prisoner's right of access to the courts was not unconstitutionally burdened by a process that provided him access to a small library in the Control Unit containing only legal reference materials, but that denied him physical access to the main prison law library. Campbell v. Miller, 787 F.2d 217, 225-28 (7th Cir. 1986). In Campbell, the federal penitentiary had no established program for providing prisoners in the Control Unit with legal assistance. Id. at 225.

Campbell suggests that a refusal to

provide high security inmates with direct access to a law library does not itself require the establishment of a legal assistance program for those inmates. In fact, Campbell supports the proposition that providing prisoners with limited access to reference material makes an otherwise exact-cite paging system constitutionally adequate. Caldwell v. Miller, 790 F.2d 589, 606 (7th Cir. 1986). For this reason, this Seventh Circuit decision also conflicts in principle with the Ninth Circuit's ruling that a paging system absent some form of legal assistance is unconstitutional.

The Eleventh Circuit also disagrees in principle with the Ninth Circuit's decision that a plan to ensure access to the courts for segregation prisoners must include legal assistance. In Hooks v. Wainwright, 775 F.2d 1433 (11th Cir. 1985), the court reversed and remanded a district court's ruling that any constitutionally acceptable

plan for ensuring Florida prisoners access to the courts had to include a provision for the assistance of counsel in some form. Id. at 1434-38. The plan found inadequate by the district court in Hooks apparently did not provide all inmates, especially those in administrative confinement, with physical access to a law library. Id. at 1435. Despite this, the Eleventh Circuit remanded the matter for, presumably, consideration of law library plans without physical access for all inmates and without legal assistance.

As decisions by the Seventh and Eleventh Circuits indicate, the Ninth Circuit's decision extends the right of meaningful access to the courts beyond the limits set forth in Bounds. In effect, its decision rewards the most dangerous and violent prisoners. The Ninth Circuit's decision means that in California prison officials no longer have the two choices presented them by Bounds. For if the Ninth

Circuit's decision stands, California prison officials will always be required to provide some prisoners with legal assistance despite the fact that its state prisons contain law libraries and inmates have effective access to those materials.

Prison officials must know the limits of prisoners' right of meaningful access to the courts for all prisoners in their custody, including those housed in the lowest and the highest security facilities. For state prison officials to make the choice offered them in Bounds, they must know what limits they may constitutionally impose upon physical access to prison law libraries. For this reason, and because of the conflict in principle between the Ninth, Fourth and Fifth, and the Seventh and Eleventh Circuits, it is imperative that this Court resolve this important issue of law. Only this Court can guide state prison officials in the decision whether to commit state resources to prison

law libraries or programs for legal assistance from persons trained in the law to satisfy all prisoners' right of access to the courts.

CONCLUSION

For the foregoing reasons, petitioners respectfully submit that the Petition for Writ of Certiorari should be granted.

DATED: March 27, 1987

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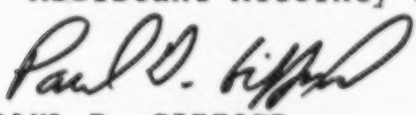

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